Filed 12/21/15 In re M.A. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.A., a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. MARTHA A. et al., Defendants and Appellants.	F071576 (Super. Ct. No. 516990) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant Martha A.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant Robert A.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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This appeal arises from an order after a Welfare and Institutions Code section 366.26[1] hearing at which the parental rights of Robert A. (father) and Martha A. (mother) were terminated as to the minor M.A. Father contends the juvenile court erred when it determined, without a hearing, that the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply, violating father's due process rights. Father argues the error requires reversal of the section 366.26 order with directions to hold a noticed hearing on ICWA applicability. Mother raises no independent issues, but joins in father's brief to the extent it benefits her.

We find no merit to father's contentions and, by extension, mother's claims, and affirm.

FACTUAL AND PROCEDURAL SUMMARY

During a traffic stop in the early morning hours of March 10, 2014, mother and father were arrested for possession of methamphetamine and outstanding warrants. Four-month-old M.A. was with them in the vehicle at the time. Mother stated she had two other children, ages eight and 14, who lived with her mother in Texas. Mother admitted daily use of methamphetamine. She also reported father used methamphetamine, but did not know how often. Mother and father failed to provide information on family members who could take care of M.A. and M.A. was taken into protective custody.

A section 300 petition was filed March 11, 2014, alleging both parents had substantial substance abuse issues (§ 300, subd. (b)) and were unable to care for M.A. while they were incarcerated (§ 300, subd. (g)). It further alleged father had an "extensive and violent criminal history," including a conviction for attempted murder.

In a conversation with the social worker prior to detention, father stated he would like M.A. placed with his niece, Gloria B. The social worker then met with Gloria B.,

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

who stated she and father were both registered members of the Paiute and "Youkeite" tribes.

At the detention hearing on March 12, 2014, father signed a Parental Notification of Indian Status (ICWA-020) stating he was or may be a member eligible for membership in the Paiute and "Youke" tribes, "registered in Stewart, NV & California." Mother indicated she did not have Indian ancestry.

M.A. was detained and placed in foster care. The juvenile court found ICWA applied. At the hearing, father reported he had Paiute, Yokut and Casunot ancestry and was a member of the Paiute and Youkeite tribes in Stewart, Nevada and California. The juvenile court ordered father to provide his tribal enrollment numbers to the social worker "ASAP."

Gloria B. stated she had father's enrollment number at her home and would provide it to the social worker. When the social worker called the next day, the person who answered the phone indicated Gloria B. was not home and would call later. The social worker called several times and left voice mails, but did not hear back from her. Father called from jail on March 17, 2014, and provided information about his relatives for the Notice of Child Custody Proceeding for Indian Child (ICWA-030).

The ICWA-030 notice was sent March 21, 2014, to 31 tribes identified as either Paiute or Yokut. It was also served on mother and father and their respective counsel. The notice contained a notation that, while father also claimed membership in the "Casunot" tribe, agency staff was unable to locate any such tribe in the tribal registry.

The ICWA-030 listed M.A.'s birth year as 2003 and place of birth as Atascosa, Texas. The notice also listed ancestors of M.A. back to great-grandparents. Relatives listed as having Indian ancestry also included actual or approximate birthdates and places.

On March 25, 2014, father called the social worker and stated he received his ICWA notice paperwork. According to father, his Yokut Tribe was in Porterville and his

Paiute Tribe was in Big Pine and Lone Pine. The social worker stated all Yokut and Paiute Tribes had been noticed and that the agency hired an ICWA expert.

The agency filed an additional information report on April 11, 2014, which included the signed certified mail return receipts (green cards).

The April 2014 jurisdiction/disposition report stated that father had a bindle containing methamphetamine in his pocket when he was arrested. Father, who was back in custody, told the social worker his current offense was his third strike and he might be facing 25 years to life. The report recommended father be denied services pursuant to section 361.5, subdivision (e)(1)[2].

Mother had been released from jail and, after an alcohol and other drug assessment, referred to an inpatient program. Mother entered and left the program the same day. The agency nevertheless recommended mother receive reunification services.

An addendum report submitted by the agency attached a report from ICWA expert Marilee Mai, dated April 9, 2014, supporting removal of M.A. and recommending placement with a relative in compliance with ICWA.[3] The ICWA expert stated that, because father reported having lived at one point on the Lemoore Rancheria, she called the Tachi-Yokut Tribe Social Services Department. The tribe indicated they were awaiting a determination from the enrollment department regarding father's status. The expert recommended that, if M.A. is found to be eligible for enrollment in the Tachi-Yokut Tribe, the juvenile court order the agency to enroll M.A. in the tribe.

At the April 14, 2014, jurisdiction/detention hearing, the juvenile court noted that not all of the green cards had been received and that ICWA "may apply." Because father requested a contested hearing, the tribes were to be renoticed. The matter was set for

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[2] Section 361.5, subdivision (e)(1) provides that an incarcerated parent be ordered reunification services, unless those services would be detrimental to the child.

[3] Mai listed M.A.'s birth year as 2012.

May 15, 2014. No mention was made by mother, father or counsel of an error in M.A.'s birthdate on the original ICWA notice or Mai's report.

A second ICWA-030 was sent April 17, 2014, this time correctly listing M.A.'s birth year as 2013; her birthplace was still listed as Atascosa, Texas.[4]

On April 18, 2014, mother contacted the social worker and stated she had father's "registry number." Mother read from a letter from the Department of Interior, Bureau of Indian Affairs (BIA) and provided the number 09122. Mother said there was another number, 89437, and something about Stewart, Nevada, on the letter and she did not know what the numbers meant. Mother was asked to bring the letter to the social worker.

On April 21, 2014, father called and, in response to information that the ICWA expert was trying to contact the Tachi-Yokut tribe, stated he did live on the Tachi-Yokut reservation for a year, but that his Yokut tribe was in Porterville. He also stated he was a registered member of the Casunot Tribe, but that tribe was not yet federally recognized.

On May 1, 2014, mother reported she could not locate the letter the social worker asked her to bring which had father's tribal information on it.

On May 6, 2014, the social worker visited father in jail. At that point, father stated he was a member of a tribe and he now had the correct number. That same day, the social worker telephoned the Summit Lake Paiute Council and spoke to the membership secretary, who indicated that neither father nor M.A. were listed on their membership lists. She also stated the Paiute Tribe does not allow members to be doubly enrolled, and she was not sure about the Yokut Tribe's policy.

On May 14, 2014, the agency filed the green cards from the second ICWA notice. All had been returned except for the one from the Fort Bidwell Reservation. The social worker telephoned the Fort Bidwell Reservation and spoke to the tribal administrator, who stated they did not currently have an ICWA coordinator and no action would be

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4 M.A.'s birth certificate states she was born in San Antonio, Texas.

taken regarding ICWA until one was hired, which was not likely to happen until summer. The tribal administrator further stated that all correspondence regarding ICWA was piling up on his desk. It was confirmed that the package from the agency had been received. The agency also submitted numerous responses from various tribes stating that M.A. was not enrolled or eligible for enrollment in the tribe.

A second addendum report recommended that, due to new information received on father's criminal history, father be denied services pursuant to section 361.5, subdivision (b)(12)[5], and attached a minute order reflecting his conviction of attempted murder.

A contested jurisdiction and disposition hearing was held May 15 and 16, 2014, and continued to June 23, 2014.

At the May 15, 2014, hearing, the juvenile court noted that, after much work, all of the required notices were sent and green cards received, except for one from the Fort Bidwell Reservation, and that the agency had been in communication with them. The juvenile court found ICWA "may apply, but there's no indication that it definitely does apply."

At the continued hearing the following day, mother provided the letter from the BIA from which she had obtained a number for father. Counsel for the agency stated the agency would look into what that number meant. The letter provided by mother on father's behalf was dated August 18, 1975[6], from the BIA Western Nevada Agency, Stewart, Nevada and was addressed only to "Dear Robert." It was signed by Superintendent Robert Hunter and acknowledges "Robert's" request for an application to

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5 Section 361.5, subdivision (b)(12) provides reunification services need not be provided if a parent has been convicted of a violent felony.

6 Father would have been three and a half years old at this point.

participate in the distribution of the Northern Paiute judgment funds. It stated it included "application forms identified by control numbers" and listed application form 09122.[7]

On May 21, 2014, the social worker called the BIA Western Nevada Agency to try to ascertain the meaning of the document provided. The BIA employee stated the number was probably not an enrollment number, because an enrollment number would also list a specific tribe. Based on the information father reported that he was Paiute and Yokut out of Stewart, Nevada and California, the BIA employee indicated father might actually be of the Washoe Tribe, and provided contact information for that tribe.

The social worker then called the Washoe Tribe and was informed that they are neither Paiute nor Yokut, but their territory includes Stewart, Nevada. She invited the social worker to send notice so that possible membership could be checked.

Based on the information received, the social worker sent a third ICWA notice to all Paiute and Washoe Tribes, attaching a copy of the 1975 letter from the BIA. Notice was also served on mother and father.

On June 4, 2014, during a conversation with the social worker, father stated his specific tribe is Northern Paiute in Stewart, Nevada. He stated he was not Washoe. Father then said his family and tribe had been located in Porterville and Bishop and he once participated in an Indian program called "Man Power."

On June 19, 2014, the agency filed the green cards from the third notice mailing. All Paiute tribes had received the notice more than 10 days before the scheduled hearing June 23, 2014. Two green cards from Washoe Tribes had not been received, but the social worker pointed out that father denied being Washoe.

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[7] The other number in the letter mentioned by mother, 89437, appears to be the zip code of the BIA, Western Nevada Agency in Stewart, Nevada.

An addendum report for the continued contested jurisdiction/disposition hearing stated M.A. had been placed with a paternal cousin. It also stated father had been moved from the safety center to the main jail, due to father's violent actions in jail.

On June 23, 2014, the third and final day of the contested jurisdiction/disposition hearing, the juvenile court found proper notice had been given to the tribes and it was unknown whether ICWA applied, "although it very well may." No party objected to the finding that proper notice was given. The juvenile court also noted that the agency had done a lot of work in trying to ascertain whether father was an enrolled member of a tribe, as he claimed.

At the conclusion of the jurisdiction/disposition hearing, the juvenile court struck the subdivision (g) allegation as it related to mother and sustained the remainder of the petition. M.A. was removed from parental custody and reunification services ordered for mother. Reunification services were denied father pursuant to section 361.5, subdivisions (b)(12) and (e)(1).

Father filed a notice of appeal August 19, 2014, appealing the dispositional order. The appeal was dismissed on November 19, 2014, after father failed to make a good cause showing that an arguable issue of reversible error existed (*In re Phoenix H.* (2009) 47 Cal.4th 835).

At an interim review hearing September 11, 2014, it was noted mother was incarcerated. Father was present at the hearing, represented by counsel. The juvenile court found it "unknown" whether ICWA applied.

On September 18, 2014, the agency submitted a motion for determination of ICWA applicability asking that the juvenile court find ICWA inapplicable. It attached letters received from the tribes that had not previously been filed with the juvenile court. The juvenile court granted the motion ex parte on September 22, 2014.

The report prepared for the six-month review hearing recommended termination of services for mother and setting a section 366.26 permanency planning hearing. Mother

had not completed any services, had multiple incarcerations during the reporting period, and had not visited M.A. since July 10, 2014. The report stated the juvenile court had made a finding on September 23, 2014, that ICWA did not apply.[8]

Father appeared at the contested six-month review hearing on December 4, 2014. At the very beginning of the hearing, the juvenile court stated that it had made a finding that ICWA did not apply because the tribes had either not responded or had responded that M.A. was not eligible for enrollment. The juvenile court noted that "initially there was a thought that M[.A.] would be eligible for enrollment in a tribe, but now it appears not." Neither father, mother nor counsel for either objected.

At the continued contested review hearing December 19, 2014, father and mother were again present with counsel. The juvenile court again noted, without objection, that ICWA did not apply. Services for mother were terminated and a section 366.26 hearing was set for April 20, 2015, for both mother and father.

Both mother and father filed notices of intent to file writ petitions, but neither followed through with a petition for extraordinary writ and the matters were dismissed as abandoned in February of 2015.

The report prepared in anticipation of the section 366.26 hearing stated M.A. continued in the home of a family who wished to adopt her. This family had previously adopted several other children. Mother had not visited M.A.; father had been provided monthly visits at the jail.

At the April 20, 2015, section 366.26 hearing mother appeared in custody. Father, who was now at Soledad State Prison, had a transport order but waived his appearance. Father's attorney made an offer of proof that, if father were to testify, he would object to the finding that ICWA did not apply and "assert that he does have Native American ancestry which he has asserted throughout this case." Mother submitted an offer of proof

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8 September 23, 2014 is the date the order, dated September 22, 2014, was filed.

that she objected to termination of parental rights and since she had been in custody remained clean and was attending "Women of Wisdom."

Mother and father's parental rights were terminated.

DISCUSSION

Father contends the juvenile court erred when it made a finding without a hearing that ICWA did not apply. As argued by father, the agency provided responses from numerous tribes that M.A. was not enrolled or eligible for enrollment in the tribe. But, he argues, "that information was not determinative of the child's membership status unless the tribe also confirmed in writing that enrollment was a prerequisite for membership under tribal law or custom." Father contends that "[g]iven the quantity and variety of the responses received from the tribes, the juvenile court erred prejudicially when it proceeded on the Agency's ex parte motion and found ICWA did not apply without notice to father, without an opportunity to be heard and examine the Agency's evidence." As a result, father contends the order terminating parental rights must be reversed with direction to hold a noticed hearing on the agency's motion for determination of ICWA applicability. We disagree.

ICWA was enacted to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. (*In re C.Y.* (2012) 208 Cal.App.4th 34, 39; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195.) Where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right to intervention. (25 U.S.C. § 1912(a).) Notice to the tribe provides it the opportunity to assert its rights by intervening in a proceeding. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174.)

ICWA applies to children who are eligible to become or who are members of a tribe, but does not limit the manner in which membership is to be defined. (*In re Jack C* (2011) 192 Cal.App.4th 967, 978.) Instead, it is the tribe's right to define its own membership for tribal purposes. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72, fn. 32.)

We have long held that a parent represented by counsel, who fails to timely challenge a juvenile court's action regarding ICWA, is foreclosed from raising ICWA issues once the juvenile court's ruling is final, in a subsequent appeal from later proceedings. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 185, 189 (*Pedro N.*).)[9]

Here, the juvenile court made multiple findings that ICWA did not apply and father challenged none of the findings until his parental rights were terminated. The first such finding was made ex parte on September 22, 2014, in response to the agency's request that the juvenile court find ICWA inapplicable. In that request, the agency noted responses had been received from all of the noticed tribes, the BIA and the Department of the Interior stating ICWA did not apply. Neither mother nor father appealed the juvenile court's finding.

Nor did mother or father appeal the finding that ICWA did not apply at the subsequent six-month review hearing in December 2014. The finding that ICWA did not apply was included in the six-month status review report; it was stated by the juvenile court at the very beginning of the review hearing December 4, 2014, when both mother and father and counsel were present; and it was repeated at the continued review hearing December 19, 2014, when mother, father and counsel were again present. At no point

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9 We acknowledge that the California Supreme Court granted review in *In re Isaiah W.* (2014) 228 Cal.App.4th 981, review granted October 29, 2014, S221263, to consider whether a parent who failed to timely appeal the juvenile court's finding ICWA did not apply is foreclosed from raising the issue of the juvenile court's noncompliance with ICWA notice requirements from the order terminating parental rights under section 366.26.

did either mother, father or counsel object or offer any new information. While both mother and father filed notices of intent to file writs, both failed to file subsequent writ petitions.

Father and mother failed, on multiple occasions, to timely challenge the juvenile court's ruling regarding ICWA applicability. As a result, both had forfeited their personal right to complain of any alleged defect in compliance with ICWA in a subsequent appeal, now that those rulings are final. (*Pedro N., supra,* 35 Cal.App.4th at pp. 185, 189.)

We note that *Pedro N.* does not foreclose a tribe's rights under ICWA due to a parent's forfeiture or waiver of the issue for failing to file a timely appeal when procedurally entitled to do so at the conclusion of an earlier proceeding. (*Pedro N., supra,* 35 Cal.App.4th at pp. 185, 189-190; see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 477-478 [court reversed juvenile court's denial of a tribe's motion to intervene after a final order terminating parental rights, and invalidated actions dating back to outset of dependency that were taken in violation of ICWA].)

Even if we were to find that mother and father have not forfeited their right to appeal this issue, we find the juvenile court's conclusion that ICWA did not apply supported by substantial evidence. (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

Based on the information gathered by the social worker and provided by the family, the agency properly provided ICWA notices to all tribes at the beginning of the case and subsequently to additional tribes when new information was received. However, father's complaint is not that notice was not given, but that the responses from the 30 plus tribes used differing language in communicating that M.A. was not considered ICWA eligible as far as the responding tribe was concerned, in violation of section 224.3, subdivision (e)(1).

Section 224.3, subdivision (e)(1) states:

> "A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe, or testimony attesting to that status by a person authorized by the tribe to provide that determination, shall be conclusive. Information that the child is not enrolled or eligible for enrollment in the tribe is not determinative of the child's membership status unless the tribe also confirms in writing that enrollment is a prerequisite for membership under tribal law or custom."

Father claims the juvenile court prejudicially erred when it failed to consider the distinction between "enrollment in the tribe" and "membership in [the] tribe." We disagree.

Section 224.3, subdivision (e)(1) "restates the commentary in the federal guidelines, which recognizes that '[e]nrollment is not always required in order to be a member of a tribe [although it] is the common evidentiary means of establishing Indian status ….' (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584, 67586, B.1. Commentary (Nov. 26, 1979).)" (*In re William K.* (2008) 161 Cal.App.4th 1, 12.) The provision also clarifies the evidentiary requirement for determining whether a minor is an Indian child by specifying that a mere statement of enrollment or eligibility for enrollment is inadequate to demonstrate the minor is an Indian child. However, neither statute nor the relevant rule of court may impose any duty upon the social worker to elicit a particular response from a noticed tribe. (§ 224.3, subd. (e)(1); Cal. Rules of Court, rules 5.480-5.487.)

Membership is not a term defined by federal or state statutes and membership criteria are the tribe's prerogative. A tribe's membership decision is conclusive for purposes of ICWA. (*In re D.N., supra,* 218 Cal.App.4th at p. 1253.)

We find each letter received from a tribe and filed with the juvenile court clearly communicated that M.A. was not considered an ICWA eligible child for purposes of that tribe.

Nor do we find father's due process rights were violated when the juvenile court determined the inapplicability of ICWA without a hearing. Section 224.3, subdivision (e)(3) provides that it is the juvenile court's duty to determine whether the procedures mandated by federal and state statute have been followed, but it does not implicate a right of the parent to have input on this decision. It is a decision based purely on documentary evidence required to be filed with the juvenile court. (See also Cal. Rules of Court, rule 5.482(d)(1), which mirrors the statute.)

Moreover, section 224.3, subdivision (f) provides that, if, after a determination is made that ICWA does not apply and new information to the contrary is received, the issue may be revisited. Therefore, there is little risk of error created by the procedure.

Here, father has not suggested that he had any further information to provide to the noticed tribes. Nor did he ever assert M.A. was actually a member of a tribe.

We find no prejudicial error in the juvenile court's finding that ICWA did not apply and reject father's claim to the contrary.

DISPOSITION

The order of the juvenile court is affirmed.

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FRANSON, Acting P.J.

WE CONCUR:

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PEÑA, J.

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SMITH, J.